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Nos. 84-1373, 84-6332, and 84-6350

In the Supreme Court of the United States

OCTOBER TERM, 1984

SCOTT FAUL, PETITIONER

v.

UNITED STATES OF AMERICA

DAVID RONALD BROER a/k/a DAVID RONALD BREWER, PETITIONER

v.

UNITED STATES OF AMERICA

YORIE VON KAHL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court judge should have recused himself because petitioners were accused of murdering federal marshals who may have worked in the same courthouse as the judge.

2. Whether the court of appeals, pursuant to its supervisory power, should have granted petitioners Faul and Kahl a new trial because of pretrial publicity.

3. Whether petitioners Faul and Kahl were denied a fair trial when the district court admitted a gun into evidence that had not been discovered until the midst of closing arguments.

4. Whether petitioner Broer's sentence for harboring a fugitive in violation of 18 U.S.C. 1071 exceeded the statutory maximum.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 10-66)[1] is reported at 748 F.2d 1204.

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[1]Unless otherwise noted, "Pet. App." refers to the appendix to the petition in No. 84-1373.

JURISDICTION

The judgment of the court of appeals was entered on November 7, 1984. A petition for rehearing was denied on January 3, 1985 (Pet. App. 67). The petitions for a writ of certiorari were filed in No. 84-1373 on February 22, 1985; in No. 84-6332 on March 1, 1985; and in No. 84-6350 on March 4, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of North Dakota, petitioners Faul and Kahl were each convicted on two counts of second degree murder, in violation of 18 U.S.C. 1111 and 1114; on four counts of assaulting United States Marshals and other law enforcement officers assisting them, in violation of 18 U.S.C. 1111 and 1114; of harboring a fugitive, in violation of 18 U.S.C. 1071; and of conspiracy to assault, in violation of 18 U.S.C. 371 (Pet. App. 11).[2] Petitioner Broer was convicted of harboring a fugitive in violation of 18 U.S.C. 1071 and conspiracy to assault, in violation of 18 U.S.C. 371 (*ibid.*).[3] Petitioners Faul and Kahl were sentenced to two concurrent life sentences on each of the murder counts; to concurrent ten-year terms of imprisonment on each of the assault charges, to run consecutively to the life sentences; to a five-year term of imprisonment on the harboring charge, to run consecutively to the life sentences and to the sentences for assault; and to five years' imprisonment on the

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[2]Both Faul and Kahl were acquitted of first degree murder on the two counts for which they were convicted on the lesser included offense of second degree murder (Pet. App. 11).

[3]Broer, who was not charged in the murder counts, was acquitted of the substantive assault charges and the charge of being an accessory after the fact to murder (Pet. App. 11).

conspiracy charge, to run concurrently with the other sentences (*id.* at 12). Petitioner Broer was sentenced to two consecutive five year terms of imprisonment.[4] The court of appeals affirmed (*id.* at 48).

1. In 1977, Gordon Kahl, a tax protestor and a member of the extremist organization Posse Comitatus, was convicted on two counts of failing to file an income tax return. He was placed on probation following a period of incarceration. In July 1980, he was summoned to appear in federal court for violation of probation, but he refused to appear. After a warrant issued, there were several unsuccessful attempts to arrest him. An all points bulletin was issued throughout North Dakota in February 1983, stating that a federal warrant for Gordon Kahl's arrest was outstanding and that he was wanted by the United States Marshal's Service. Pet. App. 12.

On February 13, 1983, Deputy Sheriff Kapp, who was aware of the all points bulletin and knew Gordon Kahl's identity, saw him in Medina, North Dakota, accompanied by his wife and petitioners Kahl and Faul. All three men carried weapons. Petitioner Kahl, Gordon Kahl's son, indicated that he was aware that the deputy sheriff was watching, and they returned to the building where they had been attending a tax protest meeting. Petitioner Broer, who also was attending the meeting and knew of the all points bulletin, called the police chief and confirmed the contents of the bulletin. Petitioners then left the building; Gordon Kahl was a passenger in Broer's vehicle, and the others followed in the Kahl station wagon, which was driven by petitioner Kahl. *Id.* at 12-14.

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[4]Joan Kahl, petitioner Kahl's mother, was also charged in three counts of the indictment. At the conclusion of the government's case, the court entered a judgment of acquittal on the charge of being an accessory after the fact to murder; the jury acquitted her of harboring a fugitive and conspiracy to assault.

As the vehicles crested a hill outside Medina, they observed a roadblock that had been established by Marshals Muir and Wigglesworth. Broer and Kahl turned into a driveway when they saw the roadblock. Marshal Muir radioed two other marshals, Cheshire and Hopson, who, along with Deputy Sheriff Kapp, were following the vehicles but had not yet crested the hill, and told them that Broer and Kahl had turned into a driveway. Petitioner Broer's attempt to back out of the driveway was cut off by Marshal Cheshire's vehicle, and the marshals at the roadblock approached. Petitioners Kahl and Faul left their vehicle and pointed rifles at the marshals, and Gordon Kahl alighted from petitioner Broer's vehicle and also pointed a rifle at the officers. Almost simultaneously, marshals Cheshire and Hopson left their vehicle, told the others to lay down their weapons, and announced that they were there to arrest Gordon Kahl. Gordon Kahl and petitioners Kahl and Faul did not lay down their weapons, but instead moved for cover. *Id.* at 14-15.

After two or three minutes, Marshal Hopson again announced that they were there to arrest Gordon Kahl. A shot was fired from the direction of petitioner Kahl, wounding Marshal Cheshire, and a gun battle ensued. Marshall Muir was killed and Marshal Hopson was shot in the head, damaging his brain and leaving him crippled. Petitioner Kahl was wounded as well. As the officers retreated, three people in a nearby mobile home observed a person, most likely Gordon Kahl, approach the wounded Marshal Cheshire and fire two shots at him at point-blank range, blowing off the top of his head. The evidence showed that Broer did not participate in the shooting. *Id.* at 15-16; 9 Tr. 172, 173.

Faul and Gordon Kahl left petitioner Kahl at a medical clinic where he was arrested. Broer surrendered later that evening, and Faul did so the following day. Gordon Kahl

remained a fugitive until June 3, 1983, when he was killed during a confrontation with federal law enforcement officers near Smithsville, Arkansas. See *United States* v. *Udey*, 748 F.2d 1231, 1234-1235 (8th Cir. 1984). Pet. App. 17.

2. Prior to trial, petitioners moved pursuant to 28 U.S.C. 144 and 455 for an order disqualifying the judges of the District Court of North Dakota, Southeastern Division, from the case. Supporting the motions were petitioners' affidavits (Pet. App. 1-2; 84-6332 Pet. App. A1-A2) stating that they were charged with the murder of two federal marshals, that the marshals were employed in the federal courthouse, and that "the personal and professional relationship, association and almost daily on-going contact between said deceased marshals and said presiding judges would make it difficult, if not impossible, for said judges to maintain an attitude of total impartiality and emotional detachment from the adversary positions that will be presented at the time of trial" (Pet. App. A2; 84-6350 Pet. App. A1-A2). Chief Judge Benson considered and rejected these motions (Pet. App. A3-A7). He stated that the suggestion of daily contact between judges and marshals at the courthouse was without any basis in fact, and concluded that "[t]he fact that a deputy marshal attends court when in session * * * does not raise an inference of bias, prejudice or partiality, nor does it give cause for a reasonable person to question the impartiality of the judge" (*id.* at A6-A7).

Petitioners also moved for a change of venue, alleging that pretrial publicity had so pervaded North Dakota that jurors there would be unable to lay aside their impressions and render a verdict based on the evidence presented in court. The district court withheld ruling on the venue motion pending completion of voir dire. A lengthy voir dire followed. The district court selected 114 veniremen for voir dire, a substantially larger jury pool than is used in most cases, and granted petitioners and their co-defendant 16

peremptory challenges rather than the usual ten. Of the 114 veniremen, 78 prospective jurors were actually questioned. Of these, nine were excused peremptorily by the prosecution and 16 by the defense. Thirty-nine potential jurors (50% of those questioned) were excused because they could not be impartial, 21 of whom (27% of those questioned) based their impartiality on exposure to the news media. The voir dire consumed three and a half days and is reported in over 700 pages of transcript. The district court implicitly denied petitioners' venue motion by proceeding to trial. *Id.* at 24-25.

During the closing arguments, the government was informed that petitioner Kahl's gun had been found. The district court, "[f]aced with an obvious attempt by an unknown individual * * * to manipulate the trial" (Pet. App. 34), held an *in camera* conference. The government, "[w]ith some trepidation" (*ibid.*), agreed to admit the gun, but would not stipulate that a bullet lodged in the handle of the gun had been fired from Marshal Muir's pistol. Petitioner Kahl agreed to admit the gun, but Faul moved for a mistrial, apparently desiring ballistics tests to prove that the bullet had come from Marshal Muir's gun. The court denied the motion. Counsel for Faul and Kahl had rested, but counsel for Joan Kahl had not. He argued, on behalf of petitioners Faul and Kahl, that the bullet had obviously come from a pistol, that Marshal Muir had carried a pistol, and that this supported petitioners' argument that the officers had fired first. *Id.* at 34-35.

3. The court of appeals affirmed. With regard to petitioners' disqualification motion, the court held that, under 28 U.S.C. 144 and 455, a judge should not recuse himself unless bias stemming from an extrajudicial source is shown. All that petitioners had shown here, however, was that the deceased marshals presumably had some contact with the judge. But petitioners had not shown any "professional or

personal relationship" between the judge and the marshals, and petitioners had raised no "reasonable question as to the judge's impartiality." Pet. App. 18-19.

The court of appeals also rejected petitioners' claim that the trial should have been moved from North Dakota. It started by noting that due process, and Fed. R. Crim. P. 21(a), require a trial "before a fair and impartial tribunal" (Pet. App. 20). If pretrial publicity about a case is "pervasive and prejudicial," a change of venue is warranted (*id.* at 23). In the absence of such publicity, the test is whether the jurors who were selected were impartial (*ibid.*).

The court of appeals first determined that the pretrial publicity was not pervasive and prejudicial. While there were 68 stories about the case in the local newspaper, most of the stories were factual in nature, many concerned the manhunt for Gordon Kahl, only two were even potentially prejudicial, and a few even portrayed Gordon Kahl and Posse Comitatus as heroes (*id.* at 22 & n.4). The court found that these stories had not prejudiced the community. While 50% of the prospective jurors were excused, only 27% were excused because of an inability to be impartial resulting from media coverage of the case (*id.* at 24). The court of appeals concluded that, under prior decisions of this Court, that did not show a community poisoned against the petitioners (*id.* at 24-25).

The court of appeals then examined the impartiality of the jurors actually selected. It noted that the trial court had used a large jury pool, granted the defendants six extra peremptory challenges, taken "great care during the *voir dire* proceedings to ensure that an impartial jury was selected," and sequestered the jury during trial (Pet. App. 25, 29).[5] Those steps "were sufficient to produce an impartial jury" (*ibid.*).

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[5]During the voir dire, the trial judge spoke at length to the prospective jurors about the importance of impartiality, not only at the beginning of

In response to the dissent's criticism that the court had focused on whether there has been a due process violation,[6] the court considered whether, as an exercise of its supervisory power to formulate standards for enforcement of criminal law in federal courts, it should order a new trial (*id.* at 30 n.9). The court concluded that "[t]he totality of the circumstances lead us to believe that the defendants in this case received a fair trial before an impartial jury" (*id.* at 31 n.9). Therefore, the court declined to exercise its supervisory power (*ibid.*).

The court of appeals also concluded that the district court had not abused its discretion in the procedures it followed in admitting Kahl's gun. The court noted that defendants were not surprised by the existence of the gun and Joan Kahl's lawyer argued that the bullet lodged in the gun supported petitioner's version of the case. In any event, petitioners were not prejudiced in any way, since the gun "did not prove anything new." *Id.* at 36-37.

Finally, the court of appeals rejected petitioner Broer's contention that he was wrongly sentenced under 18 U.S.C. 1071. Broer argued that because Gordon Kahl, the fugitive he was convicted of harboring, was convicted for misdemeanor income tax offenses, he could only be sentenced to one year's imprisonment pursuant to the misdemeanor

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his voir dire but again on the second day of voir dire. The district judge also questioned each prospective juror individually. Pet. App. 26-29.

[6]Judge Lay, who dissented, argued that, under Fed. R. Crim. P. 21(a), a "more stringent standard" applies than the test used to evaluate fairness under the Due Process Clause (Pet. App. 50). While the Rule "does not provide clear guidelines," federal courts should examine "the totality of circumstances" to determine whether a defendant's trial was "fundamentally fair" (*id.* at 51). In Judge Lay's view, the totality of circumstances indicated that petitioners could not have received a fair trial in North Dakota (*id.* at 54).

provisions of Section 1071.[7] The court of appeals concluded (Pet. App. 47-48) that petitioner's argument is refuted by the plain language of the statute which states that "[w]hoever harbors or conceals any person * * * after conviction of such person of any offense," is subject to five years' imprisonment. Since Broer was harboring Gordon Kahl after his conviction, the five year penalty applied.[8]

ARGUMENT

1. All three petitioners contend that the court of appeals erred in upholding Judge Benson's refusal to disqualify himself. Petitioners are wrong on the merits and they allege no issue of the sort that warrants review by this Court.

The test for disqualification is the same under 28 U.S.C. 144 and 455. *Phillips* v. *Joint Legislative Committee*, 637 F.2d 1014, 1019 & n.6 (5th Cir. 1981), cert. denied, 456 U.S. 960 (1982); *In re IBM Corp.*, 618 F.2d 923, 928 (2d Cir. 1980); *Davis* v. *Board of School Commissioners*, 517 F.2d 1044, 1052 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976).[9] An affidavit alleging prejudice must satisfy a three-part test: (1) the alleged facts must be material and stated with particularity; (2) the alleged facts must be such that, if

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[7]Section 1071 provides:

> Whoever harbors or conceals any person for whose arrest a warrant or process has been issued * * * shall be fined no more than $1,000 or imprisoned not more than one year, or both; except that if the warrant or process [for the harbored fugitive] issued on a charge of felony, or after conviction of such person of any offense, the punishment shall be a fine of not more than $5,000 or imprisonment for not more than five years, or both.

[8]The court noted that its ruling "is limited to the situation where the offense for which the fugitive is sought is directly related to the crime —misdemeanor or felony—for which the fugitive was convicted" (Pet. App. A48 n.12).

[9]Since the test is the same, petitioner Broer's statement (Pet. 9) that he sought disqualification pursuant to Section 455 only is beside the point.

true, they would convince a reasonable person that bias exists; and (3) the alleged facts must show bias of a personal, as opposed to a judicial, nature. *Phillips,* 637 F.2d at 1019; *Parrish* v. *Board of Commissioners,* 524 F.2d 98, 100 (5th Cir. 1975) (en banc), cert. denied, 425 U.S. 944 (1976); *Davis,* 517 F.2d at 1051. The alleged bias and prejudice "to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States* v. *Grinnell Corp.,* 384 U.S. 563, 583 (1966); *Phillips,* 637 F.2d at 1020.

As the court of appeals concluded, the affidavits were legally insufficient (Pet. App. 19). They contain conclusory allegations of bias or prejudice without sufficient factual support for those conclusions. Assuming that district court judges have some contact with federal marshals, it simply does not follow that the judges had a "professional or personal relationship" with the marshals that supports a claim of personal bias or partiality. The affidavits support none of the three requirements listed above. As the court of appeals' decision on this issue is wholly unobjectionable, and petitioners have not argued that the decision conflicts with any decision of this Court or of other circuits, this Court should not review this issue.

2. Petitioners Faul and Kahl contend that the court of appeals should have granted them a new trial in a different venue, in the exercise of the court's supervisory power. The court did not err, petitioners do not suggest a conflict in the circuits, and there is no reason for this Court to consider this issue.

As an initial matter, it is worth noting that petitioners do not now contend that their right to due process was violated by the denial of their motions for a change of venue. Nor could they plausibly make such a contention. Due process

requires a trial court to grant a defendant's motion for a change of venue (*Rideau* v. *Louisiana*, 373 U.S. 723 (1963)) or a continuance (*Sheppard* v. *Maxwell*, 384 U.S. 333 (1966)), if prejudicial pretrial publicity prevents the seating of "a panel of impartial, 'indifferent' jurors," *Irvin* v. *Dowd*, 366 U.S. 717, 722 (1961). To show that pretrial publicity deprived petitioners of a fair trial, petitioners were required to show either that individual jurors were actually prejudiced before hearing the evidence and were unable to lay aside their preconvictions and render a verdict based upon the evidence presented at trial (*Irvin*, 366 U.S. 723, 727), or that prejudicial and inflammatory pretrial publicity saturated the community where the trial was held (*Rideau*, 373 U.S. at 726-727). The court of appeals showed that the individual jurors at petitioners' trial were not prejudiced.[10] It also showed that pretrial publicity had not saturated the community.[11]

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[10]As the court of appeals concluded, the district court took great care to ensure that an impartial jury was selected. The judge spoke at length to the prospective jurors about the importance of impartiality not only at the beginning of his voir dire but again on the second day of voir dire. He also questioned each prospective juror individually, and, as the court of appeals noted, review of the voir dire shows that he took great care with his inquiries. Pet. App. 26-29. Thus, by the time it proceeded to trial, the district court was satisfied, with good reason, that it had empaneled a jury that was able to put aside any prejudices it might have and was able to judge the case on the basis of the evidence presented at trial only.

[11]While 50% of the prospective jurors questioned indicated partiality, only 27% attributed their inability to be impartial to the media's coverage of the case. The percentage does not suggest that the effect of press coverage was so great or pervasive that it saturated the community with prejudicial information. The percentage compares favorably to other cases where the press coverage was held not to have pervaded the community although it had affected a far higher percentage of the prospective veniremen. See *Patton* v. *Yount*, No. 83-95 (June 26, 1984) slip op. 4 (77% of veniremen admitted having an opinion); *Murphy*, 421 U.S. at 803 (26% of the veniremen were prejudiced against the defendant); *Irvin*, 366 U.S. 717, 727 (62% of veniremen dismissed because of fixed opinions regarding petitioner's guilt).

Petitioners contend, instead, like the dissent, that the court of appeals should have exercised its supervisory power and ordered a new trial in a different venue. It is correct that a reviewing court may, pursuant to its supervisory power, reverse a conviction because the jury has been contaminated by inflammatory publicity under circumstances that would not call for the same result when evaluating a state proceeding for constitutional error. *Murphy* v. *Florida,* 421 U.S. 794, 797-798 (1975); *Marshall* v. *United States,* 360 U.S. 310, 313 (1959); see *United States* v. *Provenzano,* 620 F.2d 985, 995 (3d Cir.), cert. denied, 449 U.S. 887 (1980); *United States* v. *Haldeman,* 559 F.2d 31, 62-63 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977). As noted in the dissenting opinion of the court of appeals, the content of this "more stringent" standard is not well defined (Pet. App. 50-51). However, applying the standard defined in *Marshall* and *Murphy* — the two cases relied upon by petitioners and the dissent — reversal pursuant to appellate courts' supervisory power is not appropriate in this case.

In *Marshall,* this Court concluded that its supervisory power required the grant of a new trial where a substantial number of jurors had read news articles reporting the defendant's prior felony convictions, information that the trial judge had already ruled so prejudicial as to be inadmissible in evidence. 360 U.S. at 311-313. It was similar circumstances — the exposure of jurors to numerous news articles reporting the defendant's prior convictions for murder and robbery — which prompted the Chief Justice, concurring in *Murphy* v. *Florida,* to state that, despite the state trial court's conclusion that the jury was impartial, he would have reversed the conviction, had it been a federal case, in the exercise of the Court's supervisory authority. 421 U.S. at 795-796, 803-804.

Application of the principles of these cases does not support the conclusion that the Court should use its supervisory power to reverse the convictions in this case. The jurors in this case were not exposed to information about any prior conviction. Nor is there any suggestion that the publicity regarding this case exposed potential jurors to information that was so prejudicial that it would have been excluded at trial. Examination of the newspaper excerpts quoted by the dissenting court of appeals judge (Pet. App. 57-63) supports the court's conclusion that, "[w]hile the media coverage in this case was thorough, it was on the whole objective; it did not even remotely approach that proscribed by the Supreme Court in [*Sheppard* v. *Maxwell,* 384 U.S. 333 (1966); *Estes* v. *Texas,* 381 U.S. 532 (1965); and *Rideau* v. *Louisiana,* 373 U.S. 723 (1963)]." Pet. App. 22.[12]

In short, neither petitioners nor the dissent cite any case like this one where a new trial was ordered as a supervisory matter. Accordingly, there is no need for the Court to consider this issue.

3. There is no merit to the contentions of petitioners Faul and Kahl that they were denied a fair trial when the district court decided to admit into evidence petitioner Kahl's gun, which had not been discovered until the midst of closing arguments.

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[12]The court of appeals noted that only two of the articles were potentially prejudicial to petitioners Kahl and Faul (Pet. App. 23 n.4). One article was captioned: " Yorie Kahl may have fired first shot in bloody shootout "; the other: " Faul accused of 'executing' deputy marshal." As the court of appeals observed (*ibid.*) and petitioner Faul admits (Pet. 9), the government stated in both its opening and closing statements that Faul was not Marshal Cheshire's executioner. Petitioner Kahl claims (*ibid.* 9) that the government also conceded in its closing statement that he did not fire the first shot. Moreover, both of these articles reported the information as possibilities, not as established fact.

As the court of appeals concluded, the district court did not abuse its discretion. Petitioners had not been surprised by the evidence because their own testimony at trial established the existence of the gun (Pet. App. 36); they responded to the evidence when counsel for Joan Kahl made "an extensive argument to the jury explaining how the additional evidence buttressed [petitioners'] earlier testimony" (*ibid.*)[13]; and because counsel was able to argue to the jury before the presentation of the government's closing argument, petitioners were not prejudiced by the order of the proof (*ibid.*). Because the "gun did not prove anything new [but] served only to corroborate the testimony of [petitioners]," the court of appeals correctly concluded that the procedures followed did not substantially prejudice petitioners (*id.* at 37).

Petitioners' arguments on this issue are almost verbatim versions of the arguments in their briefs to the court of appeals. Accordingly, their petitions offer no reason why this Court should disturb the court of appeals' well founded conclusion.

4. Petitioner Broer claims that he was wrongly sentenced under 18 U.S.C. 1071. He reasons that because Gordon Kahl, the fugitive he was convicted of harboring, was convicted for misdemeanor income tax offenses, he can only be sentenced pursuant to the misdemeanor provisions of Section 1071 (see note 7, *supra*).

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[13]Petitioners had maintained at trial that they had returned fire in self-defense in response to shots from the law enforcement officers. The government conceded at trial that the bullet lodged in the handle of petitioner Kahl's gun was not a .223 round from a rifle, and counsel for Joan Kahl argued that the bullet came from Marshal Muir's pistol. Pet. App. 33-34, 36. That conclusion, of course, shed no light on the question of who had fired first.

As the court of appeals concluded (Pet. App. 47-48), petitioner's argument is refuted by the plain language of the statute. The statute provides that harboring a person subject to an arrest warrant is a crime punishable by one year's imprisonment except that, if the warrant is for a felony charge, or is issued "after conviction of such person of any offense," it is punishable by five years' imprisonment. In this case, Gordon Kahl had been convicted of an offense, so Broer is subject to five years' imprisonment for harboring him.

The legislative history supports that statutory interpretation. The Senate Report accompanying the legislation included a letter from Attorney General Herbert Brownell, Jr., in which he stated that the increased penalties would serve as a deterrent for those inclined to conceal fugitives. The existing penalties, he explained, were inadequate, "particularly * * * in cases in which a fugitive has been charged with the commission of a felony or has been convicted of any offense, *whether felony or misdemeanor*." S. Rep. 2141, 83d Cong., 2d Sess. 2 (1954) (emphasis added). Therefore, Congress clearly understood that "offense" included misdemeanors.[14]

Application of the more severe penalty to petitioner Broer also makes sense. It is clear that a person would be subject to five years' imprisonment for harboring a convicted misdemeanant who escaped before serving a sentence

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[14]Petitioner Broer suggests (Pet. 7-8) that there is some tension between Section 1071 and the criminal escape statute, 18 U.S.C. 752(a). The two sections are in harmony. Section 752(a) provides a one-year penalty for aiding in the escape of a person accused of a misdemeanor, "prior to conviction," just as Section 1071 provides a one-year penalty for harboring a person accused of a misdemeanor. Both sections provide for a five-year penalty if a person aids in the escape of or harbors a person accused of a felony or a person convicted "of any offense." Rather than advancing his argument, petitioner's invocation of Section 752(a) supports the court of appeals' conclusion.

or while serving a sentence. Gordon Kahl was in a similar situation; he was subject to revocation of probation for his probation violation, and hence imprisonment, just as he would have been had he escaped while serving a sentence. Gordon Kahl was clearly in a different situation than a person who had merely been accused of a misdemeanor, since he had actually been convicted.[15] Accordingly, the misdemeanor provision of Section 1071 is inapplicable.

In the absence of any suggestion of a conflict, this issue does not merit further review by this Court.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1985

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[15]The court of appeals (see note , *supra*) held that "the crime for which the fugitive is sought" must relate to the crime "for which the fugitive was convicted," in order for the five-year penalty to apply. A different situation would be presented if a person were sentenced to five years for harboring a person accused of a misdemeanor who had previously been convicted of an unrelated offense. Whether the five-year penalty provision of Section 1071 would apply in such a case is not presented here.